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Book Review

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BOOK REVIEW

FEDERAL INCOME TAXATION: PRINCIPLES AND POLICIES (SUCCESSOR EDITION). By *Michael J. Graetz*. Mineola: The Foundation Press, Inc. 1985. Pp. lxxvii, 1028. \$32.50.

*Reviewed by Joel S. Newman**

One of the maxims of teaching law is that one should *teach* from the best casebook, but *assign* the second best casebook to the students. Professor Michael Graetz's *Federal Income Taxation: Principles and Policies* may well be the best income tax casebook. I will certainly find it very useful in my teaching. I will not, however, assign it to my students. Although it may be the best casebook for the teacher, it is not the best for the beginning student. I will discuss, first, why Graetz's casebook is an excellent book for me as a teacher, and second, why it is not so effective for my students.

I. Why It is the Best Casebook For Me

Graetz's casebook excels in its policy emphasis, in its variety of materials, and in its case selection and editing. It is also well organized.

A. Policy

An introductory law school income tax course must produce not only good lawyers but also good citizens. A policy orientation is essential for both tasks. This casebook's predecessor¹ was reputed to be the most policy-oriented of the income tax casebooks. Professor Graetz's successor edition retains this singular honor. The book is rich in notes on the policy aspects of the subjects treated. Graetz liberally intersperses alternative policy reform formulations from the Treasury Department's 1977 *Blueprints* study,² from their 1984 *Tax Reform* study,³ from the Royal Canadian Commission on Taxation,⁴ and from other sources.⁵

* Professor of Law, Wake Forest University; A.B., 1968, Brown University; J.D., 1971, University of Chicago.

1 E. GRISWOLD & M. GRAETZ, *FEDERAL INCOME TAXATION: PRINCIPLES AND POLICIES* (1976).

2 U.S. DEP'T OF TREASURY, *BLUEPRINTS FOR BASIC TAX REFORM* (1977). See, e.g., M. GRAETZ, *FEDERAL INCOME TAXATION: PRINCIPLES AND POLICIES* 137-39 (1985) [hereinafter cited as GRAETZ].

3 U.S. DEP'T OF TREASURY, *TAX REFORM FOR FAIRNESS, SIMPLICITY AND ECONOMIC GROWTH* (1984). See GRAETZ at 1028 (Index) for the casebook's references to this Report.

4 REPORT OF THE ROYAL COMM'N ON TAXATION (1966). See, e.g., GRAETZ at 114-15, 136-37.

B. *Variety of Materials*

Variety in presentation generates interest and adds enjoyment. In addition, it exposes the beginning tax student to the variety of materials which he or she may face in practice. Finally, when the same concept is presented in different ways, it can generate enlightenment which a single mode of communication might not. Graetz's book contains a wonderful variety of materials. The book provides not only cases, revenue rulings, notes, committee reports,⁶ and ex-

5 See, e.g., GRAETZ at 127 (quoting material from COMMISSION TO REVISE THE TAX STRUCTURE, REFORMING THE FEDERAL TAX STRUCTURE (1973)). See also Graetz's own policy notes throughout the book.

6 See, e.g., GRAETZ at 262-63 (excerpting from Senate Finance Committee Report on The Revenue Act of 1962, S. REP. NO. 1881, 87th Cong., 2d Sess. 739 (1962)). I am convinced that Congressional Committee reports are usually the least effective way of presenting material to the beginning tax student. They often are, however, a good source of information on the workings of a new statute. Therefore, a good casebook should expose even beginning tax students to a few of them.

It is dangerous, however, to give too much weight to Committee Reports. This point was made in the following exchange on the floor of the United States Senate:

MR. ARMSTRONG. . . . My question, which may take [the chairman of the Committee on Finance] by surprise, is this: Is it the intention of the chairman that the Internal Revenue Service and the Tax Court and other courts take guidance as to the intention of Congress from the committee report which accompanies this bill?

MR. DOLE. I would certainly hope so. . . .

MR. ARMSTRONG. Mr. President, will the Senator tell me whether or not he wrote the committee report?

MR. DOLE. Did I write the committee report?

MR. ARMSTRONG. Yes.

MR. DOLE. No; the Senator from Kansas did not write the committee report.

MR. ARMSTRONG. Did any Senator write the committee report?

MR. DOLE. I have to check.

MR. ARMSTRONG. Does the Senator know of any Senator who wrote the committee report?

MR. DOLE. I might be able to identify one, but I would have to search. I was here all during the time it was written, I might say, and worked carefully with the staff as they worked. . . .

MR. ARMSTRONG. Mr. President, has the Senator from Kansas, the chairman of the Finance Committee, read the committee report in its entirety?

MR. DOLE. I am working on it. It is not a bestseller, but I am working on it.

MR. ARMSTRONG. Mr. President, did members of the Finance Committee vote on the committee report?

MR. DOLE. No.

MR. ARMSTRONG. Mr. President, the reason I raise the issue is not perhaps apparent on the surface, and let me just state it: . . . The report itself is not considered by the Committee on Finance. It was not subject to amendment by the Committee on Finance. It is not subject to amendment now by the Senate.

. . . . If there were matter within this report which was disagreed to by the Senator from Colorado or even by a majority of all Senators, there would be no way for us to change the report. I could not offer an amendment tonight to amend the committee report.

. . . [F]or any jurist, administrator, bureaucrat, tax practitioner, or others who might chance upon the written record of this proceeding, let me just make the point that this is not the law, it was not voted on, it is not subject to amendment,

cerpts from law review articles, but also appropriate congressional speeches and hearings,⁷ advertisements,⁸ tax return forms,⁹ and even poetry.¹⁰

C. *Case Selection and Editing*

Professor Graetz's case selection is usually excellent, as are his decisions on when to print the court's words and when to paraphrase the decision in notes. An editor's decision as to which of the myriad of possible cases deserves mention is, perhaps, the crucial decision in the construction of a casebook. Most cases which make it into casebooks do so on the strength of their facts. The quintessential casebook case is, of course, one whose facts take a legal doctrine to its limit, hopefully clarifying the doctrine as a result.¹¹ Especially important for a tax casebook, as will be shown below, is a case whose facts raise only one tax issue without raising extraneous tax issues for which the student is unprepared. In addition, the fact patterns of some cases recommend themselves to casebook editors because they present situations with which students can identify,¹²

and we should discipline ourselves to the task of expressing congressional intent in the statute.

128 CONG. REC. S8659 (daily ed. July 19, 1982) (as quoted in *Hirschey v. F.E.R.C.*, 777 F.2d 1, 6, 7-8 n.1 (D.C. Cir. 1985) (Scalia, J., concurring)). On balance, Graetz's casebook contains too many excerpts from Committee Reports.

7 See, e.g., GRAETZ at 351-53, 383-84, 461, 911.

8 *Id.* at 587, 889.

9 *Id.* at 773-74.

10 *Id.* at 172 ("A Limerick"):

In Commissioner v. Kresge's Farid,
Who contracted before she was married—
Was it transfer or gift?
Though the U.S. was miffed,
The stock's basis was stepped-up; not carried.

I do wish that Graetz had included the Tax Court's "Ode to Conway Twitty" in *Harold L. & Temple M. Jenkins, T.C.M. (P-H) ¶ 83,667* (1983), and the Service's response in *Harold L. & Temple M. Jenkins v. Commissioner*, 23 TAX NOTES 175 (1984) ("Ode to Conway Twitty: A Reprise"), but one cannot have everything.

11 See, e.g., *Fred W. Amend Co. v. Commissioner*, 454 F.2d 399 (7th Cir. 1971) (GRAETZ at 270); *Pevsner v. Commissioner*, 628 F.2d 467 (5th Cir. 1980) (GRAETZ at 273); Rev. Rul. 83-106, 1983-2 C.B. 77 (GRAETZ at 822).

12 See, e.g., *Hantzis v. Commissioner*, 638 F.2d 248 (1st Cir. 1981) (GRAETZ at 285) (In spite of its facts, I do not believe that this opinion is worth seven pages of a casebook.); *Ruehmann v. Commissioner*, 30 T.C.M. 675 (1971) (GRAETZ at 329).

or, because they are typical,¹³ outrageous,¹⁴ funny,¹⁵ or otherwise interesting.¹⁶ As noted, Graetz's casebook contains excellent examples of each of these types.

Although an occasional complex case can be a good thing, generally casebooks should avoid cases with overly complex facts. Complicated cases require a great deal of student effort, effort which students better expend in getting a more solid understanding of basic concepts. Moreover, for some marginal students, too many complex cases can lead to despair and defeat. An editor must, therefore, think very hard before including a complex tax case, especially when a simple one would perform a similar function.¹⁷ This Graetz usually does.

In some instances, it is the words of the judge, rather than the facts, which merit inclusion of the case in a casebook. Sometimes, it is the clarity of the reasoning which recommends the case. Such cases are especially helpful when they resolve what could be a narrow dispute on broader, conceptual grounds.¹⁸ On the other hand, the ineptness of an opinion may make it attractive. Poor opinions give the student, and perhaps even the instructor, the opportunity to shine in comparison with the unfortunate judge.¹⁹ Sometimes, a court's opinion contains a treatise on prior case law, saving the casebook editor from the bother of including the prior cases.²⁰ Whenever a case, good or bad, is a leading case, it also must be considered for inclusion, but it should not be guaranteed a spot.²¹

13 See Graetz's cases on tax shelters; GRAETZ at ch. 7.

14 *Rabb v. Commissioner*, 31 T.C.M. 476 (1972) (noted in GRAETZ at 446); *Ochs v. Commissioner*, 195 F.2d 692 (2d Cir. 1952) (noted in GRAETZ at 447).

15 See, e.g., *Abdella v. Commissioner*, 46 T.C.M. 1602 (1983) (noted in GRAETZ at 134-35).

16 See, e.g., *Drucker v. Commissioner*, 715 F.2d 67 (2d Cir. 1983) (GRAETZ at 302); *McCabe v. Commissioner*, 688 F.2d 102 (2d Cir. 1982) (GRAETZ at 278).

17 See note 21 *infra* (discussion of *Knetsch v. United States*, 364 U.S. 361 (1960)). I also believe that a casebook can teach the issues of *Metropolitan Building Co. v. Commissioner*, 282 F.2d 592 (9th Cir. 1960) (when can a sale of rights to future income give rise to capital gain), with considerably less effort by including *McAllister v. Commissioner*, 157 F.2d 235 (2d Cir. 1946), instead. However, Graetz's short note describing the facts of *Metropolitan Building* is almost as good. See GRAETZ at 653-54.

18 See, e.g., *Encyclopaedia Britannica, Inc. v. Commissioner*, 685 F.2d 212 (7th Cir. 1982) (noted in GRAETZ at 314-16). See text accompanying note 23 *infra*.

19 The Supreme Court has a knack for providing this sort of case. See *Commissioner v. Duberstein*, 363 U.S. 278 (1960) (GRAETZ at 128); *Helvering v. Horst*, 311 U.S. 112 (1940) (GRAETZ at 490). Some would add *Frank Lyon Co. v. United States*, 435 U.S. 561 (1978) (GRAETZ at 567). See, e.g., Wolfman, *The Supreme Court in the Lyon's Den: A Failure of Judicial Process*, 66 CORN. L. REV. 1075 (1981).

20 See, e.g., *Druker v. Commissioner*, 697 F.2d 46 (2d Cir. 1982) (GRAETZ at 457); *RCA Corp. v. United States*, 664 F.2d 881 (2d Cir. 1981) (GRAETZ at 829). I also applaud the way Graetz uses *Commissioner v. Tufts*, 461 U.S. 300 (1983) (GRAETZ at 201), to summarize *Crane v. Commissioner*, 331 U.S. 1 (1947), so that the two cases can be covered by using *Tufts* plus a short note on *Crane*. See GRAETZ at 201.

21 *Knetsch v. United States*, 364 U.S. 361 (1960) (GRAETZ at 411), is the best example

A casebook editor should, of course, avoid lengthy opinions unless there are compelling reasons for their inclusion.²² Graetz's editing reveals examples of judicious application of all of these principles.

One example from a number of right choices is Graetz's treatment of *Encyclopaedia Britannica, Inc. v. Commissioner*.²³ This case is a marvelous one for inclusion in a casebook, for it resolves the narrow issue of capitalization versus ordinary deduction by facing the broader matching concept directly. In *Encyclopaedia Britannica*, Judge Posner suggests that the categories of recurring and non-recurring business expenses would create a more workable distinction than the categories of expenses expected to produce income over less than one year versus those expected to produce income over more than a year. He then applies his new categories to reverse the decision of the Tax Court. Graetz introduces the case with a concise, two-paragraph statement of the facts, followed by a one-page excerpt from the meat of Posner's opinion.

Given the space limitations of casebooks, the editor must make a separate decision as to how the casebook will present each case which deserves mention. Should the opinion itself be reproduced, or should the facts and holding of the case be described in a few lines of a note? Cases which merit inclusion for their facts are the best candidates for being described in a note, unless the court has done a better job of describing the facts than the editor could do. Cases that merit inclusion on the basis of their opinions are better candidates for having the opinion reproduced. Here again, Graetz usually makes the right choice.²⁴

D. Organization

When a tax lawyer analyzes a transaction, he or she must con-

of a leading case which should be *omitted* from beginning tax casebooks. It is far too complex. Although I taught it once, I concluded that the benefits derived from reading and discussing it were not nearly worth the time and effort required of the student.

22 See *Hantzis v. Commissioner*, 638 F.2d 248 (1st Cir. 1981) (GRAETZ at 285), discussed in note 12 *supra*. I believe, however, that either *Biedenharn Realty Co. v. United States*, 526 F.2d 409 (5th Cir. 1976), or *Suburban Realty Co. v. United States*, 615 F.2d 171 (5th Cir. 1980), both noted by Graetz (GRAETZ at 619-23), merits fuller inclusion. In fact, I believe that one of these two cases would provide a more efficient presentation of the subject than Graetz's use of *Adam v. Commissioner*, 60 T.C. 996 (1973) (GRAETZ at 614), plus a lengthy set of notes, GRAETZ at 618-23, does.

23 685 F.2d 212 (7th Cir. 1982) (noted in GRAETZ at 314-16).

24 Examples of instances in which Graetz correctly chose the note format rather than reproducing the opinion include *Commissioner v. Idaho Power Co.*, 418 U.S. 1 (1974) (GRAETZ at 310-11); *Commissioner v. Brown*, 380 U.S. 563 (1965) (GRAETZ at 720); *Commissioner v. Sullivan*, 356 U.S. 27 (1958) (GRAETZ at 258-59); *Tank Truck Rentals v. Commissioner*, 356 U.S. 30 (1958) (GRAETZ at 258-59); *Crane v. Commissioner*, 331 U.S. 1 (1947) (GRAETZ at 21); *Wolder v. Commissioner*, 493 F.2d 608 (2d Cir. 1974) (GRAETZ at 140); and the educational expenditure deduction cases (GRAETZ at 333-36); *but see* notes 17, 21-22 *supra*.

sider a number of things at once: Receipts must be analyzed to determine whether or not they are income, and if so, of what character, to whom, and when. Disbursements must be analyzed to determine whether or not they can be deducted, how, by whom, and when. The teacher, however, can only expect the beginning tax student to learn one of these concepts at a time. This artificial separation of tax law creates problems, problems which Graetz resolves well.²⁵ However, the casebook editor must order these separate aspects of tax law in some coherent way; and then, what he has taken apart, he must put back together again.

1. Ordering Principles

There are two basic ordering principles which apply to the materials of an introductory income tax course. The first principle organizes the materials in the order in which a good tax practitioner would conduct his or her analysis. For example, it does not make sense for a tax lawyer to consider whether a receipt was ordinary income or capital gain before he or she has decided whether or not there was any income at all. Therefore, the student should consider questions of income before questions of timing and characterization. All casebooks, including Graetz's, are organized this way.

The other ordering principle is the learning process.²⁶ In some learning endeavors, the ordering is obvious. One must learn to crawl before one can walk; one must learn to add before one can multiply. The tax learning process, however, has no such obvious organization. It is not necessary to learn about income before one can understand deductions, or vice versa.²⁷

25 Professor Graetz recognizes this problem in his Preface (GRAETZ at xxiii). *Hort v. Commissioner*, 313 U.S. 28 (1941), is a crucial case involving separable questions of basis, timing, and characterization. Graetz resolves the problem by having the student read the case twice. GRAETZ at 164, 653. The artificial separation problem also arises with interest-free loans which present issues of assignment of income, timing, deductions, and gift tax. I have no quarrel with Graetz's editorial decisions here. See GRAETZ at 121-23, 495, 861-67. *Crane v. Commissioner*, 331 U.S. 1 (1947), involves questions of basis and amount realized, but the student really cannot understand *Crane* without a feel for depreciation. Graetz resolves this problem well by discussing the case in a brief note which downplays the depreciation aspect. GRAETZ at 201. See note 20 *supra*.

26 William Andrews recognized the tension between the two ordering principles in the Preface to his tax casebook:

The materials on deductions have been rearranged. In the last edition these began with nondeductible personal expenses, and how to distinguish between those and business costs. There are substantial theoretical reasons for beginning that way, but experience has shown that in practice most students need some rounded introduction to the reasons for allowing deductions before getting immersed in the most substantial of reasons for disallowing them.

W. ANDREWS, BASIC FEDERAL INCOME TAXATION xxix (3d ed. 1985).

27 There are, of course, minor sequential building blocks. One must understand depreciation to understand recapture, and one must understand capital gains and losses to understand recapture, the charitable contributions deduction, and bad debts. Professor

There are two aspects of the learning process, however, which are relevant to the ordering of tax materials. First, the student should study at the same time materials which involve the same concept. This principle can conflict with the traditional structure of a tax casebook. For example, the concept of matching income and deductions is relevant to the question of the recovery of capital, to the question of whether expenditures are business deductions or non-deductible capital expenditures, and to the question of depreciation. Professor Graetz assigns discussion of these topics to their normally separate places, but he does a good job, through his notes, of showing their interrelationship as well as their connection to the broader question of timing.²⁸

The second aspect of the learning process requires that a student start with simple matters and progress to harder concepts. Unfortunately, no tax topic is inherently simpler than another. There are as many complex questions to ask about what income is as there are to ask about timing and characterization. However, it is important for the casebook to present whatever topic *does* come first in a simpler fashion than those which come later. In this area, Graetz's casebook falls short.

Professor Graetz's coverage of each of the aspects of tax law is very comprehensive, but he achieves this result at the cost of over-complexity toward the beginning of the casebook. This flaw is especially apparent in Graetz's Introduction.²⁹ All of the topics covered in the Introduction are those which the *serious tax scholar* should keep in mind from the beginning. However, assuming that the student, for whom a casebook is designed, reads Graetz's Introduction before learning anything else about tax law, he or she will find many of the topics either too difficult or presented in too detailed and sophisticated a fashion.³⁰

Graetz could have, and should have, treated the deductions affected by characterization, GRAETZ at ch. 3, *after* the discussion of capital gains, *id.* at ch. 5. Cf. J. FREELAND, S. LIND & R. STEPHENS, *FUNDAMENTALS OF FEDERAL INCOME TAXATION* (5th ed. 1985) (first chapter 21 discusses capital gains and losses and then chapter 23 discusses deductions affected by characterization principles). Moreover, it is also true that any knowledge which a student gains in one area of tax law gives that student a feel for the entire subject. This experience provides the student with an understanding which makes his or her study of the next material come more easily.

28 See, e.g., GRAETZ at 156-59.

29 GRAETZ at ch. 1.

30 An example of a similar flaw later in the book is the treatment of capital expenses versus ordinary deductions. See GRAETZ at 306-46. Graetz proceeds logically, from the broad concepts to the specific, and his selection of *Fall River Gas Appliance Co. v. Commissioner*, 349 F.2d 515 (1st Cir. 1965) (GRAETZ at 312), is an excellent one for establishing his conceptual framework. However, this area is an alien one to the beginning tax student. I believe that it is more effective to begin with the repair-replacement distinction. This is a distinction to which the beginning student can relate. Then, with some feel for the problem, one can go on to the broader issues.

2. Putting Things Back Together

What is taken apart must be put back together. One time-honored method is to do this through the examination. An essay question can certainly cover more than one aspect of tax law. Students can discover by reading past exams that the questions work in this manner. Accordingly, the students will acquire the skill of thinking of multiple tax aspects simultaneously in their exam preparation, with no further effort required of either the casebook or of the instructor.

It is, however, preferable for the instructor to help the students in this effort, time permitting. This can be done in many ways. Some instructors assign the task of completing a tax return based upon stipulated facts. Such an assignment can be very effective in pulling concepts together and showing their interrelationship. Alternatively, I have found it effective to spend the last class period asking whether or not the Internal Revenue Code in its entirety encourages marriage. This discussion forces the students to look at the entire body of law from a different perspective.

Professor Graetz has a different idea which also should work very well. His final section (on tax shelters)³¹ presents a marvelous group of cases, each of which concerns multiple aspects of tax law. Moreover, his presentation provides the added benefit of addressing a topic of lively current interest.

On balance, Graetz's construction of his casebook—both his editing and his decisions as to which opinions to report—is excellent. The variety of presentation and his inclusion of varied tax materials are superb. The casebook makes some connections which are positively inspiring. Nevertheless, I remain determined to keep this gem for myself.

II. Why It is Not the Best Casebook For My Students

The failure of Professor Graetz's casebook lies in the division of labor between casebook and instructor. The premise of this division of labor is that, in traditional classroom teaching, the student is expected to read the casebook first, and then go to class. Therefore the casebook, as the first teacher, must present the *basics* and *some* points for discussion. The instructor, as the second teacher, can and should take it from there.

Graetz's casebook does not do an adequate job of explaining the basics. When Graetz uses cases to explain the basics, he does well. More often, however, he explains basic concepts with notes and basic statutory mechanics with examples. The notes which are

31 GRAETZ at ch. 7.

used to explain the basics are often far too detailed.³² They function well as reference material, but they sometimes obscure the basic concept.

The over-complexity in the introductory material of the casebook, as mentioned above,³³ is one example of Graetz's failure to explain the basics. Graetz's first substantive section, "What is Income?",³⁴ provides another case in point. It begins with nine definitions of income, seven from economists, and two from cases.³⁵ This list is a handy one. However, at this early point in the casebook, it serves more to confuse than to enlighten. Graetz follows the definitions with the *Old Colony Trust* case.³⁶ This is a fine first case. Many tax casebooks treat it very early in the course. However, to follow *Old Colony Trust* with a note on tax-inclusive and tax-exclusive rates, complete with algebraic formulae,³⁷ is enough to scare the humanities majors out of their wits.

As to statutory mechanics, this is far too important a component of the beginning tax course for the sparse examples which Graetz provides.³⁸ Students need a firm grasp of the computations of the tax system because they are crucial to an understanding of how taxes work. Without this understanding, the students cannot appreciate what is at stake in the assigned cases. For example, why, precisely, is the taxpayer arguing for a high basis, or an ordinary loss? Similarly, one cannot truly understand what is at stake in tax reform without a firm grasp of the mechanics of current law. There is yet another reason for more emphasis on statutory mechanics. In most law schools, the introductory tax course is the student's first sustained look at a long, complex statute. One of the objectives of the course, therefore, should be to provide training in the reading of such a statute. For all of these purposes, Graetz's examples are inadequate.

Graetz's examples are a good *first* step. In effect, they take the student by the hand, and walk him or her through the process. However, in order to give students confidence in their understanding of the subject, they must then be given *further* problems. As in medical school teaching, students must first watch it being done, and then, they must do it themselves. Having grappled with

32 See, e.g., Graetz's notes on depreciation, GRAETZ at 346-57, and losses, *id.* at 370-77.

33 See text accompanying notes 29-30 *supra*.

34 GRAETZ at ch. 2.

35 *Id.* at 89-91.

36 *Old Colony Trust Co. v. Commissioner*, 279 U.S. 716 (1929) (GRAETZ at 92).

37 GRAETZ at 94-95.

38 See Graetz's examples on capital gains and losses, GRAETZ at 595-99; on I.R.C. § 1231 (1982), GRAETZ at 626-28; on I.R.C. § 1031, GRAETZ at 727-29; on recapture, GRAETZ at 633-36; and on charitable contributions of appreciated property, GRAETZ at 433-35.

problems the night before, the students then can come to class and see the problems solved. Moreover, the instructor can use class periods to make sure that the students can defend their computations by working through the statute, not merely by following the examples in the book.

Some of my students complain that they are not given enough problems. They do not feel confident about what they have done unless they have more than one problem for each type of computation. In short, they want to drill. My response to these students is that they may drill on their own time, either using problems in commercial study aids, or going over the examples sometimes found in the Treasury Regulations.³⁹ Too many problems take up class time needed for exploration of concepts and policy. Moreover, too many problems can reinforce the misconception of many beginning students that the study of tax law is mostly the doing of computations. Too many problems are bad for a tax course. However, so are too few. Professor Graetz's casebook has far too few.⁴⁰

III. Conclusion

Graetz's casebook is a most welcome addition to tax literature. I learned a great deal from it. Once my students have taken the introductory tax course, I will recommend it to them as well.⁴¹

39 See, e.g., Treas. Reg. § 1.162-5(b)(2)(iii) (1985).

40 Professor Graetz does use a problem on I.R.C. § 1015. GRAETZ at 161-62. Foundation Press, Graetz's publisher, appears to be aware of the dearth of problems. In an April 1986 release, Foundation Press encourages tax instructors to use Professor Graetz's casebook, but they also include the following:

PLEASE NOTE:

If you enjoy using problems, we recommend that you require Steuben and Turnier's Problems in the Fundamentals of FEDERAL INCOME TAXATION, Second Edition. It was published late in the spring and contains 216 pages of penetrating and thoughtful problems.

41 Given the strengths of Professor Graetz's casebook for the teacher and its weaknesses for the beginning tax student, this casebook should prove ideal for a masters in taxation course.

BOOK NOTE

Shaffer's *Ethics*: The Search for the Good Lawyer

AMERICAN LEGAL ETHICS: TEXT, READINGS, AND DISCUSSION TOPICS. By *Thomas L. Shaffer*. New York: Matthew Bender and Company. 1985. Pp. xxix, 645. \$31.50.

L. LAST RESOLUTION. I will read the foregoing forty-nine resolutions, twice every year, during my professional life.¹

The above quote is the last of fifty "Resolutions in Regard to Professional Deportment" written by David Hoffman in 1836 as a guide to the proper behavior for practicing lawyers. Hoffman's purpose in writing this last resolution was to impose upon lawyers the need for, or at least the habit of, continually reminding themselves of their professional responsibilities. A similar resolution should be made after reading Thomas L. Shaffer's *American Legal Ethics*.² Professor Shaffer has written an innovative and enjoyable new textbook on American legal ethics: innovative in that it does not rely on the traditional "read the code and discuss the hypotheticals" approach; enjoyable because instead it presents portraits of lawyers, both real and fictional, to demonstrate ethical qualities in the profession. The stories, and the analysis which follows each of them, make for engrossing and entertaining reading—surely a rare occurrence in law school texts. Finally, it is *American* legal ethics: American lawyers, American views and virtues, as well as American flaws.

Professor Shaffer divides his book into four parts: The Legal Ethics of Gentlemen (pp. 1-164), The Legal Ethics of the Two Kingdoms (pp. 165-361), Professional Legal Ethics (pp. 363-467), and The Legal Ethics of Dissent (pp. 469-645). Each part is in turn broken down into chapters devoted to a particular person, idea, or point of view. The appendices to the book contain various legal codes cited in the text and some "quandaries" or discussion problems, but both have been kept to a minimum by the author. Shaffer downplays the importance of ethics codes because he feels that codes merely state rules that are meant to be followed "or else," and problems are simply discussion vehicles without definite

1 2 D. HOFFMAN, A COURSE OF LEGAL STUDY (2d ed. 1836).

2 T. SHAFFER, AMERICAN LEGAL ETHICS: TEXT, READINGS, AND DISCUSSION TOPICS (1985) [hereinafter SHAFFER]. Professor Shaffer is Professor of Law at Washington & Lee University and was formerly Dean and Professor of Law at the University of Notre Dame.

resolutions.³ Shaffer instead organizes *American Legal Ethics* as a search for what constitutes ethical behavior for the lawyer, and as a quest for why such behavior is ethical. To this end, he has probably succeeded as much as is possible.

Part One, *The Legal Ethics of Gentlemen*, begins with a look at the life of "The Gentleman from Maycomb, Alabama," Atticus Finch (chapter 1). Finch, the hero of the book *To Kill a Mockingbird*,⁴ is a man who believes in truthfulness, even to the point of not shielding his young children from the evils of life. Shaffer presents a facet of legal ethics in Atticus Finch's defense of Tom Robinson, a black man accused of capital rape of a white woman. Atticus brings forth the truth—his client's innocence and the woman's "sin"—even though his town did not want to be made aware of this truth. Shaffer discusses Atticus' lie to protect Boo Radley, the somewhat retarded protector of his children: why it is significant, how Atticus' culture had an effect on the way he behaved, and how our own culture will have an effect on how we, as lawyers, behave. In addition, Shaffer speaks of Atticus' courage in confronting a lynch mob where truth (this time spoken by Atticus' daughter, Scout) turns back the mob. Shaffer shows that these virtues—truth and courage—both shaped by our culture, are qualities of the good lawyer.

The other half of Part One is devoted to David Hoffman, "The Gentleman from Baltimore" (chapter 2), whom Shaffer regards as the father of legal ethics. Hoffman spoke of the importance of character and manners. He regarded character as an invaluable trait, given the public trust placed in lawyers and the distrust which a lack of character would bring. Manners, Hoffman argued, are worthy of cultivation so that the lawyer may move in professional and social circles with honorable and moral deportment.⁵ To foster these ends, Hoffman set forth his "Resolutions" for the ethical lawyer.⁶ Hoffman emphasized justice,⁷ or doing what is right (even if it means repaying a debt on which the statute of limitations has run⁸); civility,⁹ meaning professionalism in court and respect for judges (no matter how pompous); self-restraint¹⁰ (no matter how unjust

3 *Id.* at xxvii-ix, App. II-1.

4 H. LEE, *TO KILL A MOCKINGBIRD* (1960).

5 SHAFFER at 60-61.

6 *See* note 1 *supra*.

7 SHAFFER at 59-94.

8 In holding that the ethical lawyer should urge his client not to take advantage of a statute of limitations, Hoffman asserts that if a debt is in fact owed, the only ethical stance is to pay the debt. The fact that the debt has gone unpaid for a period of time longer than the statutory time period for bringing suit upon it does not detract from the fact that the debt is owed, nor the ethical obligation to pay it.

9 SHAFFER at 94-113.

10 *Id.*

the case may be); prudence or practical wisdom¹¹ (including handling clients' money properly, not representing interests adverse to former clients, and not taking cases unless one possesses the requisite expertise); courage¹² against temptations from wealth and the occasional unpleasantness of lawyering; and fraternity¹³ with other members of the bar (including not taking half fees to undercut other lawyers, and acknowledging all correspondence). While everyone may not agree with all of Hoffman's illustrations of his principles, some of which are perhaps dated,¹⁴ his philosophy is nevertheless instructive on how to be an ethical attorney.¹⁵

Shaffer begins Part Two, *The Legal Ethics of the Two Kingdoms*, with the most significant portion of the book, "A Separate Professional Morality" (chapter three). He borrows the title of this Part from Martin Luther to describe what some feel are the two faces of the lawyer: the private person and the working attorney. Shaffer comments on how the earlier statements of rules of behavior for the American lawyer made no distinction between private and professional life, and how each generation of lawyers has revised these codes to remove much of what was said about morality. He notes that the American Bar Association's new Model Rules of Professional Conduct avoid words such as "good," "right," "conscience," and "propriety" in favor of terms such as "mandate" and "permission." Shaffer illustrates the separate morality of professional life through one of John D. MacDonald's characters who says, "Forgive me for lying to you" which is answered with the requested forgiveness and, "Oh yes. You've got a *job* to do."¹⁶

Shaffer reveals that the philosophy of the "two kingdoms" is displayed in the American lawyer as the "adversary ethic": the notion that a lawyer must do all for his client, even if it is not right or moral. In his foray into this matter, Shaffer discusses both the his-

11 *Id.* at 114-31.

12 *Id.* at 132-45.

13 *Id.* at 146-64.

14 Readers may argue whether the importance of "good address" of others, the need to refrain from "morbid timidity," that contingent fees need *always* be avoided, or that the lawyer must develop a passion for the profession or abandon it need be set forth in a code of conduct for lawyers. *Id.* at 95, 133, 149.

15 Hoffman's philosophy is instructive on what it is to be ethical because his resolutions are not merely the minimum standards for behavior—as are the present day Code and Rules—but rather provide patterns for excellence in behavior to be strived for. It is this approach of looking beyond oneself and not being satisfied with being adequate that is instructive. Another reason is that Hoffman's resolutions do not stop at suggesting the proper legal and business conduct of the ethical lawyer. His resolutions suggest the proper deportment of the ethical lawyer. Their purpose is not to make us all the same, as there is plenty of room for individuality, but to encourage self-examination of the whole person—not just the lawyer portion of the person. This makes Hoffman's philosophy truly instructive and sets his Resolutions apart from other attempts at ethical codification.

16 SHAFFER at 168 (emphasis in original).

tory of the adversary notion and the morality of it (for example, in cross-examining a witness known to be truthful), and provides some concrete examples before he talks about his "one kingdom" theory. This theory provides *substantive values* by denying the distinction between law and morality.¹⁷ Here Shaffer explores Judge George Sharswood's statement that "no man can ever be a truly good lawyer, who is not in every sense of the word, a good man."¹⁸

Shaffer continues Part Two with a portrait of Justice Louis Brandeis (chapter four) and there ponders whether Brandeis, who paid his law firm for his time when he took on public interest cases, lived in the two kingdoms. Shaffer describes the furor over Brandeis' nomination to the Supreme Court and discusses the objections raised by other lawyers at the time. From Brandeis we learn the ethical quality of fearlessness in holding to what you believe, even when few others believe in it. Part Two closes with selections from the famous debate between lawyer David Dudley Field, counsel to the owners of the notorious Erie Railroad in the 1870s and author of the Field Code on civil procedure, and Samuel Bowles, editor of the *Springfield (N.Y.) Republican*, a respected newspaper (chapter five). Field's view was that a lawyer's professional activities were private, while Bowles felt that lawyers' (and journalists') careers were public matters subject to certain moral requirements for the common good. Shaffer sketches the historical outline of the times in which these men made these arguments, but allows readers to decide for themselves to which camp they should belong.

Part Three, Professional Legal Ethics, begins with "The Moral Theology of the Law Firm" (chapter six). It is largely a vehicle for unfolding the story of lawyer Henry Knox and his young associate protege, Thomas Colt.¹⁹ The story tells how Knox defined a moral philosophy in terms of the law firm for himself and how he passed it on to Colt. Its point (in connection with the next chapter, "Self-Deception in the Law Firm") is to show how lawyers can lose sight of the client in the midst of their work. Of how perfection in the work product can turn our attention from the best interests of the client to the point of thinking that the client has no stake in, or is incapable of understanding, the importance of matters which he brings into the office.²⁰ Subtle overtones in this section suggest that adopting the moral theology of the law firm can exact costs from the lawyer in terms of his family life and even his personal morality. Seeing things only from the point of view of "the firm" may blind the attorney to the needs of his family. It may even dull

17 *Id.* at 208-215.

18 G. SHARSWOOD, AN ESSAY ON PROFESSIONAL ETHICS 168 (1854).

19 The story is from L. AUCHINCLOSS, THE GREAT WORLD AND TIMOTHY COLT (1959).

20 SHAFFER at 380, 384.

the lawyer's sense of what is right which he had at the time of graduation from law school. This part of the book continues by offering some hope from Alasdair MacIntyre.²¹ He suggests that lawyers in association with each other—not as a group of lawyers, but as an association of professionals—might be able to overcome the potential evil of the legal institution. Part Three concludes with “The Ethics of Partisanship in the Law Office” (chapter nine), a discussion of whether it is ethical to be a partisan in the office. Professor Shaffer presents the interesting fact that when the ABA approved the Model Code of Professional Responsibility in 1969, it left out the distinction between the lawyer's role in open court and the lawyer's role as counselor.²² Shaffer describes situations which are legal, yet unethical,²³ and how total acceptance of the client's wishes leaves other persons involved in the matter unprotected and at a disadvantage. The adversarial process is inappropriate in these circumstances because these other persons are not represented by counsel and because there is no judge to preside over and resolve the disputes.

Shaffer then explores three differing views of the lawyer's role in practice: The “morality of role” portrays the lawyer as an agent or “hired gun.” The “morality of conscientious objection” provides that the lawyer does not have to abide by his client's views (which may also dictate that the lawyer separate himself from the client's views by terminating the attorney-client relationship). Finally, the “morality of care,” which Shaffer finds to be the best of the three, entails the lawyer's concern that the client become a better person, that the lawyer has an investment in the client's goodness, and that they, *together*, make moral choices.²⁴

The final section of Professor Shaffer's book, Part Four, is entitled The Legal Ethics of Dissent. This part begins with “Malcontents in the Legal Profession” (chapter ten), which contains two charming stories about lawyer Ephraim Tutt, the creation of lawyer-writer Arthur Cheney Train, which appeared in the Saturday Evening Post in the 1920s and 30s. Mr. Tutt was a successful lawyer with a streak of “charity retailer” (a term he liked to use to describe himself; John D. Rockefeller was a “charity wholesaler”) in him. That is, he occasionally took unpopular cases or engaged in unu-

21 A. MACINTYRE, *AFTER VIRTUE* (1982).

22 Much of Professor Shaffer's discussion is based on remembrances of Professor Harry W. Jones of Columbia University, a member of the Joint Conference on Professional Responsibility of the American Bar Association and the Association of American Law Schools, which made the distinction in the lawyer's role in its response to the ABA in 1958. Some of Professor Jones' views on the matter can be found in Jones, *Lawyers and Justice: The Uneasy Ethics of Partisanship*, 23 VILLANOVA L. REV. 957 (1978).

23 SHAFFER at 441.

24 *Id.* at 449-53.

sual, but legal, practices to see that justice was done. In one story it backfires, although no one is really hurt. In another, Tutt succeeds. The two stories show how Shaffer's ethical lawyer strives for what is right, even if it sometimes places him on the side of the "dissenters." To temper those who might go too far outside the system's parameters of acceptable behavior, the chapter ends with accounts of two disbarred attorneys. In both cases, the lawyers lost perspective on their obligation to the law and society. Some would say they simply broke the law, but the first description is more accurate. The personal humiliation and pain they each went through following disbarment should be enough to remind the readers that the practice of law is a privilege, not a right.

The next chapter, "Law Against Order" (chapter eleven), deals with two groups of lawyer-dissenters. One group, aiming at immediate reform, has a civil demeanor to their dissent. The other, which challenges the system as a whole, does not. The first group, the "civil revolutionaries," are mainly those who fought *within* the system for social change in the 1950s and 60s. Men like Thomas C. Walker of Virginia and Dean Charles Hamilton Houston of the District of Columbia. The "uncivil revolutionaries" were those who sought social change *outside* the system, primarily by trying to end it. Shaffer notes that lawyering itself inhibited this second group because it is *based on* the system, which is by nature conservative.²⁵

The book concludes with a discussion of "The Immigrants" (chapter twelve), those lawyers not of WASPish upbringing and background. Shaffer discusses "Mediterranean cynicism," followed by Roman Catholic morals, then ethnic and religious loyalty, and finally, the potential for abuse of power and prestige by lawyers, subtly told through the interesting real life story of 1930s Jewish lawyer Fanny Holtzmann, who was not a Louis Brandeis nor a terrible person. By these examples of how the best intentioned lawyer can err, Shaffer reminds lawyers of the need to be cautious.

This need to be cautious brings the reader back to the last of Hoffman's resolutions: to periodically reread the resolutions on ethics.²⁶ Shaffer's book is an excellent tool for reevaluating one's ethical viewpoint. The practitioner would be well rewarded by rereading Shaffer's book every five or so years, or by rereading portions of the book spread over that time. This would help to keep the reader's mind on his own ethics. This is not to say that the law firm turns the mind away from this, but that the process itself does, and that the "self-deception of the law firm"²⁷ might as well.

25 *Id.* at 576.

26 See note 1 *supra* and accompanying text.

27 SHAFFER at 397-415 (chapter seven).

As a textbook, *American Legal Ethics* has some drawbacks. First and foremost, it is long. Of course, most law textbooks are, but ethics courses are usually not as many credit hours in length as other "more substantive" courses. While the book is "sectionalized," it must stand as a unified whole, and therefore needs to be read in its entirety. Second,² the chapters themselves are long and might not lend themselves to a series of reading assignments. Third, many beginning ethics class topics are not covered in the book. Knowledge of the Model Code of Professional Responsibility is required on most bar exams, and while most of the Code is interspersed throughout the book, it is not emphasized. Given the bar's demands that schools teach ethics in the familiar ways—codes, cases, and problems for discussion—Shaffer's book is not enough by itself to meet the student's needs. If the book is added to these requirements, there would probably be more material than can be covered in the allotted class time. Furthermore, if ethics is taught during the first or second year, the book may be above the student's practical experience or legal learning levels. Third years, who may well need an ethical "kick" out into the world, may lack the patience to read the book.

Not all of these points are the author's fault, however. Perhaps law schools place too much emphasis on the Code. This book would be an excellent tool to change the traditional thinking on how to teach ethics in law school. A greater emphasis on what lawyers *should* be would make better lawyers. In addition, a different approach to the ethics course (i.e., using Professor Shaffer's book) just might prompt third year students to give the subject some serious thought.

Finally, some of the real court cases used to illustrate points in the book overwhelm rather than prod the reader to think about the issues presented. The problem is that the book concentrates on moral and ethical shortcomings within legally acceptable practices, while all of the reported cases involve disciplined lawyers who stepped across the *legal* line. This being the case, it may be better not to include the cases at all. It seems that all of the truly good lawyers in *American Legal Ethics* were the fictitious ones. Coincidence perhaps, or just possibly that "real" good lawyers go unclaimed, if not unnoticed. The cynic might assert that this is proof that we cannot be as ethical as Professor Shaffer urges. Others may argue that these stories are simply literary constructs which express lawyers' unfulfilled desires to be better. Professor Shaffer would reject these notions. In any event, Professor Shaffer's text could use a real life lawyer-hero. Real lawyers cannot be perfect, but then neither were the fictional lawyers in the book. They were fictional, *not fictitious*. What lawyers can try to be is better than they are.

While the typical law school curriculum does not have, as yet, a place for Professor Shaffer's *American Legal Ethics*, this does not mean that it should not find one. The book is a major piece of legal scholarship by one of America's most prolific legal scholars.²⁸ It provides a good focal point for the practitioner and a good launching pad for the new lawyer.

Glenn R. Schmitt

²⁸ Professor Shaffer has written seven other books. The *Legal Resource Index* list twenty-seven articles written by Professor Shaffer from January 1980 to May 1986.